No. 10519 Cr.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATHANIEL WINSTON HENDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S OPENING BRIEF.

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TOPICAL INDEX.

3. Whether or not the coupons came into possession of the defendant in his official capacity as Chairman of the War Price and Rationing Board.

4. Whether or not the property alleged to have been embezzled had been entrusted to the defendant and was lawfully in his possession.

5. And whether or not, under the circumstances of the case, the trial court erred in admitting evidence as to the commission by the defendant, of other offenses for the purpose of proving the defendant's intent in connection with the offense charged in the indictment.

It is the position of the Government that the only question that can possibly be presented on this appeal is the last named one, that having to do with the admission of evidence or other offenses. In fact, adherence to the rules of this Circuit preclude even this last point being raised.

III.

Objections of Appellee to Appellant's Specification of Errors.

On page 9 of the appellant's brief, there is a so-called specification of errors which in no way follows the Assignment of Errors as contained in the transcript of record on page 77 thereof. Appellee contends that Rule 11 of the Rules of the Circuit has not been complied with by the appellant in taking this appeal.

Rule 11, of this Circuit has been in existence long enough so that the Bar should be sufficiently acquainted with its contents and this Circuit has on many occasions in the past insisted upon its observance.

The Asssignments of Error, found on page 77 of the transcript of record are as follows:

I.

"That the Circuit erred in refusing to direct the jury to bring in a verdict of Not Guilty as to each Count in the Indictment at the close of the Government's case in chief."

II.

"That the Court erred in refusing to direct the jury to bring in a verdict of Not Guilty as to each Count in the Indictment at the conclusion of all of the testimony and evidence in the case."

III.

"That the Court erred in allowing in evidence testimony concerning offenses other than those set forth in the Indictment upon which the defendant was on trial."

Rule 11, of the Circuit requires "the full substance of evidence admitted or rejected" to be contained in the assignments and on this appeal there has not been the slightest attempt to comply with this rule.

In the case of *Muyres v. United States,* 89 F. (2d) 783 (9th Cir.), this court said as follows:

"There are four assignments of error. Assignment 1, is to the admission of evidence. It does not quote the full substance of the evidence admitted as required by our Rule 11, and is therefore disregarded.'

A somewhat similar situation was before the court in the case of

> *Girson v. United States,* 88 Fed. (2d) 358, (9th Cir.),

where the court said:

> "Appellants, under one point, contend that the court erred in permitting the witness Haines to testify as to the alleged shortages of clothing supplies and blankets at Fort Missoula. Appellants argue that this point is raised by assignments 11, 12, 13 and 16. We cannot consider assignment 11 and 16 because they do not comply with Rule 11 of this court, requiring the quotation of 'the full substance of the evidence admitted or rejected.' This rule as interpreted by *Goldstein v. United States* (C. C. A. 9), 73 Fed. (2d) 804, and *Mullaney v. United States* (C. C. A. 9), 82 Fed. (2d) 638, requires that the objection, grounds therefor, the ruling of the court and the exception thereto must be stated in the assignment of error."

Turning now to *Mullaney v. United States* (*supra*), we find that the court said as follows:

> "Assignments of error numbered 23 to 27, both inclusive, and number 30, relating to the admission and rejection of evidence, do not show the objections to such evidence, the grounds thereof, nor exceptions to the rulings of the court. This court has held that such assignments do not comply to Rule 11 of this court and therefore we will not consider them."

Having in mind the foregoing authorities and the consistent attitude of this court for many years, the appellee does not believe it necessary to answer any of the con-

tentions set forth on pages 9 to 18, inclusive, of appellant's brief. The insistence of the court of compliance with Rule 11 would preclude the appellant from even having this court consider Assignment No. 3 of the assignment of errors which point is discussed on page 19 of appellant's opening brief.

However, since this court has the inherent right to take notice of prejudicial error whether it is assigned or not, the question of the admission of evidence of other offenses will be treated in this brief and the authorities of the appellant will be discussed and analyzed, without waiving the objection of appellee that the assignment does not comply with the rule. In presenting this assignment the appellant has not differentiated between evidence touching upon facts which of themselves constitute some legal offense, and facts which prove the commission of an exactly similar offense. Court decisions are often loosely worded in this regard and speak of "evidence of similar offenses" which, as a matter of fact, if the record is examined the evidence may only show conduct of a general nature which might or might not amount to a similar offense, or the evidence may show a precisely similar legal offense utterly remote both as to time, place and circumstances from the offense for which the defendant is being tried. It is the realization of this situation by the courts which has prompted them to pronounce the rule that whether or not evidence of this character is admissible is to be determined by the facts and circumstances in each case, and that it is primarily a question for the trial judge to determine and that unless the error is clearly demonstrated the Appellate Court will not override and reverse the action of the trial court.

Appellee insists that an examination of the record discloses that the trial court permitted, over the objection of the defendant, the witness Murray to testify to his course of conduct with the defendant covering a period of three or four months. The witness Murray testified that he told the defendant the very first time he met him that he needed some additional ration coupons. [Tr. p. 47.] At that time defendant reached down at the end of his desk and gave him a few coupons; that later on he received his "C" book and used up its contents, and went back and asked the defendant for additional coupons, stating that he needed them for a trip to Bakersfield, California [Tr. p. 48], at which time the defendant told the witness to go out and he would find some in the car of the defendant. [Tr. p. 49.]

The record shows that the next contact between the witness and defendant was around the 30th of January, 1943, when they met outside of the headquarters of the Ration Board and that the defendant told the witness Murray that if he got any more coupons he would have to buy them, and also suggested that the witness might be able to sell coupons. [Tr. p. 50.] The record does not show any completed transaction at this point, but only a discussion of the possibilities of the situation. A few days later the witness called the defendant and told him that he thought he could sell one thousand coupons. This was approximately the first part of March [Tr. p. 52], and that as the result of this conversation he met the defendant and actually purchased 250 "C" coupons for which he paid the defendant $20.00. [Tr. p. 53.]

Testimony further shows another meeting had subsequent to a telephone conversation [Tr. p. 55] when a sale of "C" coupons and "T" coupons was completed. Shortly after this last mentioned transaction the witness was arrested by the OPA investigators. After his arrest the arrangement was made between the investigators and the witness, for the witness to contact the defendant and arrange for the purchase of further coupons, and it is this last transaction for which the defendant stood trial.

It is the position of the appellee that it does not make any particular difference whether these instances referred to in the record constitute past completed offenses, or whether or not, as contended by appellant, evidence of this character must show "that the proof of the latter offense must be plain, clear, and conclusive." The instances complained of by appellant show a chain of connected acts between the defendant and the witness limited in point of time to their immediate conduct for a period of three months, and each particular act complained of shows that the defendant was misusing the coupons under his charge, namely in some instance giving them away without pecuniary gain and in others making an outright sale. This evidence shows plan, scheme, design, and was admissible in evidence as tending to prove the particular intent existing in the mind of the defendant at the time of the commission of the offense for which he stood trial.

After analyzing the cases cited by appellant in support of his view of the law, appellee will cite and quote from cases which clearly and succinctly support the action of the trial court in admitting this evidence.

IV.

Analysis of Cases Cited by Appellant.

In cases such as this, it is difficult, if not impossible to lay down any hard and fast rule which will be applicable in all circumstances. Such fact was specifically commented upon in the case of

Fish v. United States, 215 Fed. 544;

cited and quoted from in appellant's brief. The court said as follows:

> "While there are exceptions to the general rule—that on the trial of a person for one crime evidence that he has been guilty of another crime is irrelevant—it is not to be understood that any of the exceptions, when rightfully applied, go to the extent of sanctioning the idea that a defendant's propensity to commit crime, or to commit crimes of the same sort as the one charged, can be put in evidence to prove him guilty of the particular offense; and that to come within the exceptions there must be some other real connection between the extraneous crime and the crime charged."

The above quotation clearly points out the principle and the exceptions, and appellee believes that the facts in the instant case come within the exceptions. In other words, the evidence objected to by the defendant was limited to the particular witness who testified to the offense charged in the indictment, and related to a course of conduct covering a period of several weeks.

There is no similarity between the facts in this case and in the case of *Fish v. United States,* used by appellant in his opening brief.

At page 26 of appellant's brief, the case of *Boyd v. United States,* 142 U. S. 450, is cited and quoted from.

This old case is probably one which is most used by appellants when raising the question of the admissibility of similar offenses. The case is a very respectable authority when cited under circumstances which justify the use of the language of the decision, but it can not be indiscriminately used as supporting the contention of a defendant in every kind of trial and regardless of circumstances.

The *Boyd* case was a murder charge, the murder being committed in the perpetration of a robbery. At the trial, over the objection of the defendant, the Government introduced evidence of the robbery of at least three other persons at a time considerably prior to the robbery in which the murder was committed, and in speaking of this circumstance in the trial the Supreme Court said:

> "The principal assignments of error relate to the admission against the objection of the defendants, of evidence as to several robberies committed prior to the day when Dansby was shot, and which, or some of which at least, had no necessary connection with, and did not, in the slightest degree, elucidate the issue before the jury, namely, whether the defendants murdered John Dansby on the occasion of the conflict at the ferry."

In the above quotation we find the real principle on which evidence of other crimes is admitted, namely, is the other crime connected with the commission of the crime charged in the indictment or would it to some degree explain the issue which the jury is called upon to decide? Further along in the opinion, the court said as follows:

> "If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robbery of Rigsby and Taylor, it may

> be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed * * *."

We call the attention of the court to the above language wherein the Supreme Court recognizes that evidence of other robberies by the defendants might be admissible, due to the peculiar circumstances disclosed by the record, and that if the evidence had been limited to these particular robberies, the court might not have seen fit to disturb it. The circumstances of each case are the controlling factors in determining the admissibility of evidence of similar offenses, and no predetermined rule can be laid down as controlling in all cases.

The next case referred to by appellant in his brief is that of *Hatchet v. United States,* 293 Fed. 1010, and we are at loss to understand why this case was cited at all, because by no stretch of the imagination could it be considered as stating anything other than the well known principle against the admission of evidence concerning other crimes without in any way whatever referring to the many exceptions to that rule.

The facts in the *Hatchet* case were as follows: The defendant upon being arrested by police officers for the crime of larceny, was asked by two police officers if he had been previously arrested and upon his denial of any previous arrest, they thereafter confronted him with a photograph and certain other evidence, whereupon he admitted a prior arrest and conviction. This testimony was permitted to be elicited from the officers over the objection of the defendant. Of course, such evidence was

clearly inadmissible because there was no question of identity of the defendant before the court and the admission of such evidence was highly prejudicial because it was wholly independent of the commission of the crime for which the defendant stood charged.

The case of *Parris v. United States,* 260 Fed. 529, cited and also quoted in appellant's brief is not such a case as will support the position of the defendant on this appeal. That was a case wherein the defendant and his wife were arrested in Oklahoma City on a charge of illegally possessing morphine and other narcotics, and at the trial of the case, over the objection of the defendants, evidence was permitted to be introduced to the effect that approximately a year previous at Tulsa, Oklahoma, the defendants were arrested and found to be in possession of morphine and other narcotics. In discussing the error committed by the Court in the admission of this evidence, the Circuit Court of Appeals for the Eighth Circuit says as follows:

> "Under these rules the evidence relating to the situation and transactions of the defendants below and the police officers at Tulsa on the 24th and 25th of March, 1917, was clearly incompetent, irrelevant and prejudicial: (1) Because it fails to prove any sale of or dealing in narcotics at Tulsa by either of the defendants; (2) because no proof or evidence was produced at the trial that the situation or transactions at Tulsa in March, 1917, were in any way a part of or connected with the alleged sale of the bottle of morphine by Mrs. Paris to Daisy Allen in Oklahoma City on February 15, 1918; and (3) because the intent of the defendants, or either of them, was not an essential element of the offense with which they were charged in the case at bar."

An analysis of the above quotation will show that the court ruled as it did, first, because the evidence permitted to be introduced was vague and uncertain in that it did not fully show or prove a dealing in narcotic and, secondly, that not only the difference in time of substantially one year but also the geographical situation, namely, acts in one city far removed from another, was a factor in determining its incompetency and that the evidence was in no way a part of or connected with the sale of the bottle of morphine for which the defendant was being tried.

If we analyze the evidence we find that the so-called similar offenses which the appellant complains of were limited to transactions between the defendant and the very person who was the chief Government witness and who made the purchase of the coupons which the appellant is charged with having embezzled. These other offenses show a plan and series of transactions over a period of three or four months. Hence the facts of the present case are clearly distinguishable from any of the facts related in any of the cases analyzed. It therefore follows, that those cases cannot be used as an authority for charging the trial court in the instant case with the commission of prejudicial error.

Another case cited by appellant is that of *Gart v. United States,* 294 Fed. 66, which was an action in which the defendant was charged under an indictment for the violation of the Harrison Narcotic Act, and in the trial evidence was introduced by the Government which tended to show that at different times and upon the public streets of a city, the defendant delivered a package to another party. The evidence did not show the contents of the

package, but the inference was strong that this package contained narcotics. In speaking of the prejudice worked against the defendant under such circumstances, the Circuit Court on appeal said as follows:

> "It must be apparent that such a line of testimony if not properly admissible would be highly prejudicial. Standing as evidence before the jury, it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets by delivering packages containing the drug to persons indiscriminately and yet there was no proof that the package so testified as having been delivered by the defendant at a time and place not charged in the indictment contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance ,which not having been taken from the jury by the trial court left it with them for consideration."

From the above quotation it is easily discernible why the action of the trial court in that case was condemned and the case is therefore not authority for a reversal of the instant case because of the wide difference in the factual situation.

The case of *MacLafferty v. United States,* 77 Fed. (2d) 715, is cited by the appellant as an authority justifying a reversal on the ground of the erroneous admission of evidence of similar offenses, but when this case is analyzed it also fails to support the legal proposition contended for by the appellant. This case is also a narcotic case in which a physician and surgeon was charged with violation of the Harrison Narcotic Act, the indictment being in three counts and the testimony showing that at the trial and over the objection of the defendant, he was cross-examined concerning other and different charges than

those contained in the indictment, and the court in discussing the facts in this particular situation said as follows:

> "We hold that before the evidence in relation to these prescriptions other than the ones described in the indictment could be admitted in evidence it was necessary for the Government to show that such other prescriptions or sales were connected with actual violations of the law."

In other words, in this holding the court had recourse to the principle announced in the *Gart* case, namely, that it was definitely prejudicial to a defendant to have vague and suspicious circumstances introduced in evidence against him where the circumstances themselves did not show a violation of the law but permitted the jury to draw such inference. The last quotation is very persuasive of the fact that had the Government established these prior prescriptions or sales as actual violations, the holding of the Court might have been different. We say this for the reason that in the *MacLafferty* case this Court quoted, with approval, the language used by the Fifth Circuit in the case of *Dysart v. United States,* 270 Fed. 77, where in disposing of another narcotic case the Fifth Circuit said as follows:

> "The evidence shows beyond dispute that plaintiff in error issued within a few months many hundred prescriptions for morphine sulphate to persons addicted to the use of morphine, who came to him not for medical treatment, but for prescriptions upon which they could secure morphine to satiate their appetites."

V.

The District Court Did Not Err in Admitting, Over the Objection of Appellant, Evidence of Similar Offenses.

We have already analyzed the authorities submitted by the appellant, and have shown beyond any question that they have no application to the facts involved in the instant case. We refrained purposely from answering the State Court authorities cited by the appellant and some cases quoted from for the reason that we are inclined to the view expressed by the case of *McNabb, et al. v. United States,* 318 U. S. 332, where the court said:

> "The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone v. United States,* 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. *E. G., Ex parte Bollman & Swartwout,* 4 Cranch 75, 130-31; *United States v. Palmer,* 3 Wheat. 610, 643-44; *United States v. Furlong,* 5 Wheat. 184, 199; *United States v. Gooding,* 12 Wheat. 460, 468-470; *United States v. Wood,* 14 Pet. 430; *United States v. Murphy,* 16 Pet. 203; *Funk v. United States,* 290 U. S. 371; *Wolfe v. United States,* 291 U. S. 7; see 1 Wigmore on Evidence (2d ed. 1940) pp. 170-97; Note, 47 Harv. L. Rev. 853. And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

The question of the admissibility of evidence of other offenses is one which must always be decided by a trial court in each particular case.

This question was very properly treated by Justice Hand in the case of *United States v. Brand,* 97 F. (2d) 605 (2d Cir.), where the court said:

> "The first is the admission on the scienter of the sale by Brand of the other stolen car to one Ross. The Argument is based on the doctrine of Regina v. Oddy, 2 Denison C. C. 272, Copperman v. People, 56 N. Y. 591, and Edwards v. U. S., 18 F. (2d) 402 (C. C. A. 8), that evidence of the receipt of other stolen goods is not admissible unless the prosecution proves that the accused knew them to have been stolen. At least in this circuit there is no such doctrine. Sapir v. U. S. (C. C. A.), 174 F. 219. We later did indeed give an *obiter* assent to Regina v. Oddy, *supra,* in Wolf v. U. S. (C. C. A.), 290 F. 738, but the evidence then before us was clearly inadmissible anyway; and the authority of the case is to be understood as limited to the facts. Means v. U. S. (C. C. A.), 6 F. (2d) 975, 979. Nakutin v. U. S., 8 F. (2d) 491 (C. C. A. 7), states the proper doctrine, for the competence of such evidence does not depend upon conformity with any fixed conditions, such as upon direct proof of scienter, or the identity of the thief in the earlier instance, or of the victim, or the number of instances in which the accused received stolen goods, or the similarity of the goods stolen. These are all relevant circumstances but not necessary constituents. Nor can we see any basis for distinguishing between knowledge and intent in such cases. The judge must decide each time whether the other instance or instances form a basis for sound inference as to the guilty knowledge

> of the accused in the transaction under inquiry; that is all that can be said about the matter. If, for example, the subject of the indictment were the last of a series of purchases from the same thief; the earlier purchases would be competent, for thieves are unlikely to risk repeated transactions with innocent buyers. Again if a number of purchases were of goods of the same kind, mere coincidence is less probable as their number increases."

Regarding the admission of evidence of other similar offenses, we desire to call the attention of the court to the case of *Wolfson v. United States,* 101 Fed. 430 (5th Cir.). This was a case wherein the defendant was charged with the crime of embezzlement, as was the defendant in the instant case. Evidence of other offenses both prior to and after the offense charged were admitted in evidence over the objection of the defendant. Concerning the admission of this evidence and whether or not it constituted prejudicial error, the court said as follows:

> "It is assigned that the court erred in admitting, against the objection of the defendant, the testimony of Edward P. Moxey, tending to show that the account of the defendant with the Union National Bank of New Orleans had been largely overdrawn, as appeared from alleged entries in the books of that bank prior to the 21st day of April, 1894, and as far back as February, 1892, covering a period of time more than three years prior to the filing of the indictments. It is insisted that the evidence of Moxey tended to show the commission of criminal offenses for which Wolfson was not on trial, and that these offenses were barred by the statute of limitations. One of the offenses charged in the indictment was

the unlawful abstraction of money from the bank. The money was paid out on Wolfson's checks. Wolfson apparently had to his credit $267.97. Some of the checks were drawn for sums less than the amount standing on the books to Wolfson's credit. If Wolfson really had the money on deposit, that would be a defense to the charge, because it would be no fraud to draw out his own money. It was, therefore, relevant for the government to prove, if it could, that he in fact had no money to his credit; that is, the government had the right to prove, if it could, that his account was overdrawn. When a defendant is on trial for one offense, irrelevant testimony of the commission of another offense should not be received. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, or, in cases where the intent is material, if it tends to show the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it."

VI.

The Court Did Not Err in Instructing the Jury Upon the Purpose of the Admission of This Evidence.

The court was very careful in fully and fairly charging the jury concerning the reason for the admission of prior similar offenses and limiting the purpose for which it might be considered. The court even went farther and very carefully instructed the jury concerning the evidence of the witness Murray as he stood before the court in the partial light of an accomplice or conspirator.

The particular instruction of the court to the jury on the question of other similar offenses is found on page

70 of the transcript of record, and for the convenience of the court is copied herein in full, and is as follows:

> "You are instructed that any evidence which was admitted bearing on the alleged embezzlement by the defendant of any gasoline ration coupons, other than those mentioned in the indictment, is not to be considered by you for the purpose other than the question of defendant's intent concerning the coupons charged in the indictment as having been embezzled by him.
>
> "Before the jury may infer guilty intent from the evidence of another crime of a like nature, such offenses and all the elements thereof must be established by evidence which is plain, clear, and conclusive.
>
> "The jury may infer guilty intent from evidence of other crimes of a like nature, if any is shown by the evidence, only if it first believes from other evidence that the act charged by the indictment was done by the plaintiff."

Conclusions.

It is respectfully submitted that the District Court did not commit error, and therefore its judgment should be affirmed.

Respectfully submitted,

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